90-1953

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

No. 90-1802

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

Cross Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CROSS PETITION FOR WRIT OF CERTIORARI

Marion G. Follin, III
Counsel of Record
Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence
Post Office Box 990
Greensboro, NC 27402
(919) 274-2992
Counsel for Respondent

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Is the Extended Earnings part of the Nationwide Agent's Security Compensation Plan an employee pension benefit plan under the Employee Retirement Income Security Act of 1974, as amended?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	3
JURISDICTION	4
STATUTE INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE RESPONDENT'S CROSS PETITION	12
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

Darden v. Nationwide Mutual Insurance Co., No. 83-96-CIV-3 (E.D.N.C. May 23, 1985) vacated and remanded, 796 F.2d 701 (4th Cir. 1986), on remand, 717 F.Supp. 388 (E.D.N.C. 1989), aff'd, 922 F.2d 203 (4th Cir. 1991) .....passim

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982, rehearing en banc) 17

Fraver v. North Carolina Farm Bureau Mut. Ins. Co., 801 F.2d 675 (4th Cir. 1986) cert. denied 107 S.Ct. 1375 (1987) 15

Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437 (N.D. Ohio 1988), rev'd on other grounds, 892 F.2d 79 (6th Cir.) cert. denied 111 S.Ct. 370 (1990) 16

STATUTES

Employee Retirement Income Security Act Sec. 3(2)(A), 29 U.S.C. Sec. 1002(2) (9188) 5, 6

Employee Retirement Income Security Act, 29 U.S.C. Sec. 1002(2)(A)..... 13

Employee Retirement Income Security Act Sec. 502(a), 29 U.S.C. Sec. 1132(a) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1602

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

Cross Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

CROSS PETITION FOR WRIT OF CERTIORARI

The respondent Robert T. Darden hereby cross petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

The petitioners filed a Petition for Writ of Certiorari on May 22, 1991. The petitioners (collectively referred to as ("Nationwide") contend that the plaintiff Robert T. Darden ("Darden") was not an "employee" of Nationwide within the meaning of the Employee Retirement Income Security Act of 1974, as Amended (ERISA) and petition this Court to resolve a conflict between different Circuit Courts of Appeals as to the meaning of "employee" under ERISA.

In the event this Court grants Nationwide's Petition for Writ of Certiorari, Darden respectfully asks that this Court review the decision of the United States Court of Appeals for the Fourth Circuit that the Extended Earnings portion of the Nationwide Agent's Security Compensation Plan was not an employee pension benefit plan under ERISA.

OPINIONS BELOW

The Memorandum and Recommendation of United States Magistrate filed on March 8, 1985, is reprinted in Respondent's Appendix 1a. The initial unreported decision of the United States District Court for the Eastern District of North Carolina in this matter was issued on May 23, 1985, and is reprinted in the Petitioners' Appendix ("Pet. App.") at 47a. The decision of the Fourth Circuit vacating and remanding the initial decision is reprinted in the Petitioners' Appendix at 32a and reported at 796 F.2d 701 (1986) ("Darden I"). The order of the Fourth Circuit denying rehearing with respect to Darden I is reprinted in the Petitioners' Appendix at 53a. The unreported Order of the District Court filed on June 22, 1988, finding that the Extended Earnings part of the Agent's

Security Compenstaion Plan was not an employee pension benefit plan under ERISA is reprinted in Respondent's Appendix 50a. The Memorandum Opinion of the District Court on remand is reprinted in the Petitioners' Appendix at 13a and reported at 717 F.Supp. 388 (1989). The second opinion of the Fourth Circuit, dated January 7, 1991, is reprinted in the Petitioners' Appendix at 1a and reported at 922 F.2d 203 ("Darden II"). The order of the Fourth Circuit denying rehearing with respect to Darden II is reprinted in the Petitioners' Appendix at 51a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. Sec. 1254(1) (1988). The decision of the Fourth Circuit in Darden II was issued on January 7, 1991.

Petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc on January 18, 1991, which was denied on February 22, 1991. Petitioners filed a Petition for Writ of Certiorari on May 22, 1991, which was received by the respondent on May 23, 1991. The respondent relies upon U.S. Supreme Court Rule 12.3 in filing this Cross-Petition.

STATUTE INVOLVED

Section 3(2)(A) of Title I of ERISA, 29 U.S.C. Sec. 1002(2) (1988), provides:

> Except as provided in subparagraph (B), the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employer organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program -
>
> (i) provides retirement income to employees, or

> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

STATEMENT OF THE CASE

Darden brought this action pursuant to Sec. 502(a) of ERISA, 29 U.S.C. Sec. 1132(a) to recover pension benefits due him under Nationwide's retirement plan for insurance agents.

The parties filed cross-motions for summary judgment. The case was referred to United States Magistrate Charles K. McCotter who in a Memorandum and Recommendation filed on March 8, 1985, found that Darden was an employee under ERISA and that the Agent's Security Compensation Plan was an employee pension

benefit plan under ERISA. Respondent's Appendix 1a.

It its initial decision, the District Court rejected the Magistrate's Recommendation and issued summary judgment for Nationwide based on its conclusion that Darden was not an employee under the meaning of ERISA. (Pet. App. 47a). The Fourth Circuit held in Darden I that the District Court erred by applying the incorrect standard to the term "employee" under ERISA and remanded the case to the District Court for further proceedings. In its decision filed on June 22, 1988 (Respondent's Appendix 52a), the Court denied both parties' motion for summary judgment on the issue of whether Darden was an employee under ERISA. In that order, the Court found that the Extended Earnings portion of the Nationwide Agent's Security

Compensation Plan was not a pension plan within the meaning of ERISA. In its subsequent Memorandum Opinion filed on July 5, 1989, the District Court held that the Deferred Compensation portion of the Nationwide Agent's Security Compensation Plan was an employee pension plan under ERISA. The Fourth Circuit affirmed the District Court's finding that the Extended Earnings portion of the plan was not a pension plan under ERISA.

The Fourth Circuit in Darden I summarized the facts as follows:

> From 1962 until November 1980, Darden acted as an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through commissions, rather than through a fixed salary.

> The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of the agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plan." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months. 796 F.2d at 702-703.

The Agent's Security Compensation Plan became effective July 1, 1969. It was preceded by a Group Retirement Plan for agents of Nationwide known as the GA-103. Mr. Darden became enrolled in the Nationwide Agent's Retirement Plan or GA-

103 in April, 1964. The new plan adopted in 1969 was composed of the Extended Earnings Plan and the Deferred Compensation Incentive Credit Plan.

Mr. George W. Frink made a presentation in May, 1971 to the Nationwide Agents' Advisory Council Meeting. An outline of his talks provided that one of the advantages of the new plan was that it would provide increased retirement benefits for agents. Benefits at retirement included the Extended Earnings portion as well as the Deferred Compensation Incentive Credit part of the plan.

Under the Deferred Compensation Incentive Credit portion of the plan, an eligible agent was credited with deferred compensation incentive credits according to a scale based on each year's total original and renewal commissions. Each year,

amounts based upon the formula were credited to the agent's account and "funded" in a group annuity contract with Nationwide Life Insurance Company. The plan contained a vesting schedule known as the "Rule of 45." An agent whose employment with Nationwide terminated would be eligible to begin receiving a part of the Deferred Compensation portion of the plan at age 50 with the percentage received gradually increasing up to 100% at age 60.

The Extended Earnings portion of the plan was comprised of the agent's renewal service fees earned during the last twelve months preceding cancellation of his Agency Agreement. An eligible agent could begin receiving the Extended Earnings portion of the Agent's Security Compensation Plan over a period of three years beginning sixty days after cancellation of the Agreement.

In order to be eligible for the plan, an agent must have served at least five years as an agent of Nationwide. An agent could elect from various methods of payment of benefits under the plan. Darden elected to have his benefits payable as a life only annuity. The most recent agent's benefit statement which Darden had received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664.00 in the Deferred Compensation Incentive Credit Plan and $65,706.00 in the Extended Earnings Plan.

REASONS FOR GRANTING THE RESPONDENT'S CROSS PETITION

If the Court decides to review the decision of the Fourth Circuit with respect to whether Mr. Darden is an employee under ERISA, it is entirely appropriate for the Court to also review the question of whether the Extended Earnings portion of

the Nationwide Agent's Security Compensation Plan is an employee pension benefit plan under ERISA since the latter question is an equally important question of federal law which should be decided by this Court.

The Fourth Circuit in its opinion in Darden II, 922 F.2d at 208, found that the Deferred Compensation Plan and the Extended Earnings Plan were components of a single plan. The Fourth Circuit affirmed the decision of the District Court that the Deferred Compensation Incentive Credit part of the plan constituted an employee pension benefit plan under ERISA, but held that the Extended Earnings part did not. The statutory definition of an employee pension benefit plan contained in ERISA, 29 U.S.C. Sec. 1002(2)(A) does not allow for such a divergence. The statute defines an

employee pension benefit plan as any plan established or maintained by an employer which provides by its express terms or as a result of surrounding circumstances retirement income to employees or results in a deferral of income for periods extending to the termination of covered employment or beyond. The Agent's Security Compensation Plan was composed of two parts but is only one plan as the Fourth Circuit found in its opinion. The statute simply does not provide for dividing a pension plan into two parts, one covered by ERISA and one not.

In its Memorandum Opinion, the District Court found as follows:

> Nationwide explicitly encouraged its agents to rely on the Agent's Security Compensation Plan as a means of providing for their retirement. An audio-visual program prepared by Nationwide in 1980 to explain the plan to its agents stated:

> Your DCIC [Deferred Compensation Incentive Credit] is a foundation upon which to build a total retirement plan. Along with such plans as HR-10's and IRA's, it can provide a more-than-adequate retirement income. The other part of the foundation is Extended Earnings.

717 F.Supp. at 392.

The purpose of the Extended Earnings Plan was to provide retirement income to Darden. He elected to be paid in the form of a lifetime annuity, which is clearly retirement income.

The Fourth Circuit relied on its prior decision in Fraver v. North Carolina Farm Bureau Mut. Ins. Co., 801 F.2d 675 (4th Cir. 1986), cert. denied 107 S.Ct. 1375 (1987). In Fraver, the Court held that payment of an amount equal to the renewal commissions of the final twelve months

following termination of an agent's services constituted a buy-out of the departing agent and not a pension plan. Following a trial in a suit by a Nationwide Agent for his pension plan benefits, the District Court in Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437 (N.D.Ohio 1988), rev'd. on other grounds, 892 F.2d 79 (6th Cir.) cert. denied 111 S.Ct. 370 (1990), found that the evidence introduced at trial showed that a Nationwide agent had no right to customer accounts which he could sell and the Extended Earnings part of Nationwide's plan was not a "buy-out." The Fourth Circuit in Darden I likewise found this to be the case when it stated that the value of the agency reverted to Nationwide upon his termination and that Darden was not able to build up equity in his business

which he could sell upon retirement. 796 F.2d at 707.

The Court in Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982, rehearing en banc), stated that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." 688 F.2d at 1373. The Extended Earnings portion of the Agent's Security Compensation Plan clearly satisfies this standard and the statutory definition of an employee benefit plan.

CONCLUSION

The Cross Petition for Writ of Certiorari should be granted to resolve this important question of federal law.

Respectfully submitted,

Marion G. Follin, III
Counsel of Record
Smith, Patterson, Follin,
Curtis, James, Harkavy
& Lawrence
Post Office Box 990
Greensboro, NC 27402
(919) 274-2992
Counsel for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN, Plaintiff v. NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY and NATIONWIDE LIFE INSURANCE COMPANY, Defendants	)	MEMORANDUM and RECOMMENDATION

[Filed March 8, 1985]

The plaintiff, Robert T. Darden, is a former insurance agent for the defendant insurance companies, Nationwide. Darden seeks to recover of Nationwide certain monetary benefits which he alleges are due him under programs maintained by the defendant and known as "Deferred

Compensation Incentive Credits" and "Extended Earnings." Nationwide has refused such payments on the grounds that Darden violated a non-competition covenant in his Agent's Agreement, thereby triggering a forfeiture provision in said contract. Darden maintains that the provisions of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1001, et seq., were applicable to this program and that his interest therein were non-forfeitable. Nationwide contends that the plans were not controlled by ERISA and, even if they were, Darden's relationship to Nationwide was that of an independent contractor to which ERISA did not apply. The parties have filed cross-motions for summary judgment. This matter has been referred to this Court for ruling pursuant to 28 U.S.C. Sec. 636(b)(1)(B).

After considering the record herein and arguments of counsel, the Court makes the following findings and recommendations.

A. Proposed Findings of Fact

1. From approximately 1962 until November 20, 1980, Darden was a non-salaried insurance agent for Nationwide. The relationship between the parties was governed by a series of written contracts called Agent's Agreements. The last agreement became effective on January 1, 1977, and remained in force until November 20, 1980, the date on which Nationwide terminated said contract under a termination provision contained therein. The Agent's Agreement provided for a program referred to as the Agent's Security Compensation. This program consisted of two plans known as "Deferred Compensation Incentive Credits" and "Extended Earnings,"

under which Darden might receive certain future monetary payments in accordance with one of several available schedules.

2. Under the Deferred Compensation Incentive Credit Plan, Nationwide annually credited to an account maintained for Darden a sum based on Darden's original and renewal service fee earnings as an insurance agent. The Extended Earnings Plan provided for payment by Nationwide to Darden of a sum of money equal to the prior twelve months' renewal service fees earned upon the agent's retirement, termination, death or disability.

3. Paragraph 11(f)(1) of the Agent's Agreement provided that the liability of Nationwide for benefits under the Agent's Security Compensation Plan shall cease and terminate in the event the agent engaged in the fire, casualty, health or life

insurance business within one year of the cancellation of the Agent's Agreement within a 25-mile radius of the former business location of the agent. Paragraph 11(f)93) provided that the liability of Nationwide for benefits under the plan shall cease and terminate if the agent at any time after cancellation of the agreement induced a policyholder of Nationwide to cancel or replace any insurance contract in force with Nationwide or furnish the name of a policyholder to a competitor.

4. In October, 1980, Nationwide terminated Darden's agreement because of "bad business practices." Following the termination of the agreement, Darden went back into business in December, 1983, at the same location he had utilized as a Nationwide agent. Darden began selling

insurance as an independent agent representing various competitors of Nationwide. Relying on the provisions of Paragraph 11(f) of the agent's agreement, Nationwide then notified Darden that he would not receive any of the benefits which he earned under the Agent's Security Compensation Plan.

5. The most recent agent's benefit statement which Darden had received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664 in the Deferred Compensation Incentive Credit plan and $65,706 in the Extended Earnings plan. Under the election which Darden had on file with Nationwide at the time of his termination, he was entitled to approximately $490 per month for the remainder of his life under the Extended Earnings portion of the plan, to

begin within sixty days after his termination. He was entitled to approximately $120 per month for the remainder of his life under the Deferred Compensation Incentive Credit Plan, to begin at age fifty. At his termination, Darden was 46 years of age.

6. Darden first became employed by Nationwide in September, 1960. For the first years of his employment he underwent training by Nationwide and received a salary on a weekly basis. After the initial training period, Nationwide began paying Darden on a commission basis. Over the years, Nationwide would periodically change the Agent's Agreement and Darden would sign a new contract.

7. As an insurance agent for Nationwide, Darden sold automobile insurance, fire insurance, life insurance,

and group health and life insurance. He serviced Nationwide policyholders by collecting premiums and forwarding them to Nationwide and assisted policyholders and Nationwide with the processing of claims. In addition to receiving commissions from Nationwide, Darden was paid bonuses based on persistency (renewals of policies) and a favorable loss ration.

8. Since 1960, Darden operated his business at 102 Highway 210, Spring Lake, North Carolina. Darden employed various clerical employees at his own expense to work for him. He paid the expenses of maintaining his office.

9. Nationwide furnished Darden with stationery, forms, manuals, books, pencils, paper clips and staples. On the front of the building Darden maintained a sign containing the word "Nationwide."

10. Nationwide obtained the appropriate insurance licenses for Darden from the State of North Carolina. The licenses indicated he was an agent for Nationwide, but Darden bore the expense of obtaining these licenses. Under Paragraph 4 of the Agent's Agreement, defendant agreed that he would represent Nationwide exclusively in the sale and service of insurance policies and would not write policies of insurance for other companies without the written consent of Nationwide. On occassion Darden would use other insurance companies when Nationwide could not provide the required insurance.

11. Darden paid his own employment taxes and insurance taxes from commissions forwarded to him by Nationwide. Darden was eligible for major medical insurance, disability insurance, and life insurance

through a plan maintained by Nationwide for its agents. Premiums were paid by Darden by deducting them from the commissions which he received from Nationwide. The Agent's Security Compensation Plan was funded entirely by Nationwide in addition to the commissions earned by the agents.

12. The Agent's Agreement provided that Darden was an independent contractor and that the agreement could be cancelled by either party at any time upon written notice.

13. Darden was subject to supervision by Nationwide with respect to his office procedures. The parties dispute the nature and extent of this supervision. Nationwide's regional supervisor states that Nationwide had no right to control Darden and that his communications with Darden were only suggestions,

recommendations, and ideas to assist Darden for the mutual benefit of both parties. Darden admits that he agreed to implement many of these suggestions, because they would work to the benefit of him as well as Nationwide.

14. Darden was subject to a number of directives on how to do business from district and regional sales managers. The directions which Darden received from his supervisors were mostly in the form of suggestions to which Darden and his sales managers would agree.

15. Beginning in early 1978, Nationwide conducted a series of meetings with Darden concerning the loss ratio of Darden's agency. On February 9, 1978, Nationwide's Regional Sales Manager, William R. Mayo, held a meeting with Darden. As a result of this meeting Darden

and Mayo agreed to certain procedures to be utilized in handling renewals. Also discussed were suggestions as to telephone quotas, collection of premiums, and interview techniques by Darden's staff. This understanding is expressed in a letter of February 12, 1978, from Mayo to Nationwide's District Sales Manager, Billy G. Kiker.

Darden and Kiker had a conference on April 5, 1979, where they "decided and agreed" on certain steps regarding automobile portfolio analysis. This conference resulted in an agreement on specific steps that would be implemented by Darden for new business. These steps included secretarial training to the satisfaction of Darden and Kiker, with the training to be arranged by Darden and with

Kiker to be informed of the sessions.

Other steps agreed upon were:

> Six months of premium will be collected. Telephone quotes will not be given. Each secretary will have a list of checkoff questions to ask. . . . The application will be fully filled out by secretaries . . . . The secretary will initial the application. . . . A claims log will be kept on voluntary business to identify claims frequency problems. All drivers with out-of-state licence should be questioned thoroughly. . .

Kiker's and Darden's agreement on this program is outlined in a letter of May 21, 1979, from Kiker to Darden. In this letter, Kiker also indicated his agreement in giving Darden support in specific areas in order to get Darden's loss ratio back in line. The letter indicated that Darden agreed to implement the program immediately and that the program would be reviewed by Kiker within 30 days. Kiker emphasized the requirement of Darden to follow this

program when he said, "However, this program must be conscientiously applied on an everyday basis. And it must be a constant with no deviation." The language used in this letter by Kiker indicates that this was a mandatory program to be followed by Kiker, although the specific steps in the program were reached as a result of Kiker's conference with Darden.

Additional specific action was agreed upon by Kiker and Darden as indicated by Kiker's letter to Darden of April 20, 1980. Specific action was stated as to voluntary claims filed, six month premium collection, telephone quotas, secretarial training, inspection of automobiles, writing full coverage, and ascertaining violations of out-of-state license holders. Kiker again agreed to provide his assistance in specific areas.

During these conferences, Darden was advised that he should close his office during the lunch hour, between 12:30 and 1:30; however, Darden chose not to do so. Darden also was instructed to write a full package of insurance for new business and to prepare weekly a new business report for the regional sales manager.

16. Darden's office was subject to unannounced audit by Nationwide.

17. Darden was not allowed to hire other insurance agents and could hire only clerical help. He attended monthly training sessions conducted by Nationwide. Sometimes, Nationwide would furnish Darden with names of potential prospects. Darden was required by Nationwide to keep a list and inform Kiker which leads had been solicited. The regional sales manager visited Darden's office and instructed him

on business practices. At meetings with agents, the regional sales manager would instruct them on how to sell insurance and advise them on the type of appearance the office should present to the public.

18. Darden was not required to attend meetings and training sessions scheduled by Nationwide; however, he was sent letters informing him that a meeting would be held and that it would be to his advantage to be there, since such meetings involved telling agents how to sell. Darden did not attend all of these meetings. Paragraph 1 of the Agent's Agreement reads in part: "We [Nationwide] may offer to you [Darden] from time to time training, counseling, and guidance based on our accumulated experience in the sale and servicing of business. However, it is understood that

you may reject or accept such offers at your discretion."

19. Nationwide employees would meet with Darden's office manager to give her directions on how to operate the office. The district sales manager for Nationwide would frequently visit Darden's office unannounced and observe the operation of the office. He would instruct Darden's employees on various procedures and would conduct training sessions for Darden's employees.[1]

20. The regional sales manager told Darden that his office was located in an undesirable place and to close his office on Wednesday afternoons and not to be open on Saturday. Although Nationwide suggested relocation of Darden's office and a change in his hours of operation, Darden did not do so.

21. Nationwide forwarded Darden's gross commissions to him without deduction of social security taxes, income taxes or similar items. Nationwide reported Darden's gross earnings to the Internal Revenue Service on Form 1099, rather than on Form W-2, which is used to report the income of employees. Darden calculated, reported, and paid all federal, state, and local taxes due on the commission income earned as an agent for Nationwide. Darden was not entitled to receive from Nationwide any sick leave, annual leave, vacation pay, jury duty pay, or any other such fringe benefits. Nationwide did not furnish to Darden any insurance for him or his family.

Nationwide provides its employees and not agents with holiday pay, vacation pay, sick pay, and pay for jury duty. Employees of Nationwide can purchase group life and

group health insurance through Nationwide, and Nationwide contributes toward the group premiums. Nationwide has a qualified retirement plan for its employees and the Agent Security Compensation Plan for its insurance agents, such as Darden.

22. Darden was solely responsible for all of his business expenses, including his office premises, overhead, insurance licenses, and similar items. Darden had the right to hire, fire, pay and control the employees who worked in his office. Darden had latitude to exercise his independent judgment as to the time, place and manner of soliciting and selling insurance and servicing policyholders. Darden was not required to account to Nationwide for his daily activities.

23. Nationwide did not provide Darden with an office or parking space or the

payment of any of his business expenses. Darden first rented his office premises and later purchased them. Darden was responsible for all of his costs of operation except for some manuals and office supplies furnished by Nationwide. He furnished and paid for his own automobile and other transportation and expenses attendant thereto.

24. The agent's agreement limited Darden's specific area to the state of North Carolina. The agent's agreement prohibited Darden from selling policies of companies other than Nationwide, and he could only sell the type of insurance specified in the agreement.

25. Following Darden's termination in October, 1980, he was required to turn over to Nationwide all of Nationwide's manuals, portfolios, reference guides, policies,

supplies, and policyholder files. If any policyholders called upon him for services, he was to direct them to the district sales manager. The business and records were not Darden's property, but belonged to Nationwide. After Darden was terminated, he could not sell his insurance agency because he did not own any interest in his renewals.

Proposed Conclusions of Law

ERISA covers any employee benefit plan established or maintained by any employer engaged in commerce. 29 U.S.C. Sec. 1003(a). An employee benefit plan is a plan established to provide various types of benefits to employees. 29 U.S.C. Sec. 1002(3) and Sec. 1002(2). ERISA's protection is for employees and not for independent contractors.

A. Independent Contractor or Employee?

The central issue in this lawsuit is whether Darden was an employee of Nationwide, so as to be covered by ERISA, or an independent contractor, for which ERISA provides no coverage. See U. S. Department of Labor Letter 75-40 (April 17, 1975).

ERISA defines "employee" simply as "any individual employed by an employer." 29 U.S.C. Sec. 1002(6). No further specific statutory guidance as to the meaning of "employee" is given by ERISA. In determining the meaning of "employee" under ERISA, courts have applied state common law tests. See Wardle v. Central States, Etc., 627 F.2d 820 (7th Cir. 1980). Other courts have attempted to fashion a federal test based on interpretation of other federal statutes and their perceived purposes.

Cohen v. Martin's, 537 F.Supp. 766 (S.D.N.Y. 1982); See also, U. S. v. Silk, 331 U.S. 704 (1947). Irrespective of which test is used, the two sources look at nearly identical factors in determining employee status. Fraver v. North Carolina Farm Bureau Mutual Insurance Company, No. 83-129-CIV-5 (E.D.N.C., June 26, 1984). (See attachments).

The common law test focuses on the amount of control which the employer has over the worker. Continental Bus System, Inc. v. N.L.R.B., 325 F.2d 267 (10th Cir. 1963). Under common law, many factors are considered to determine the question, such as:

(1) the right to hire and fire assistants and associates without approval of employer;
(2) the provision by the employer of or investment by the employee in facilities and equipment;
(3) method of compensation;
(4) power to determine hours of work;

(5) duration of permanence of relationship; and
(6) degree of skill required.

Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra. These same factors are important under similar cases interpreting the employee/independent contractor relationship under federal statutes. U. S. v. Silk, supra.

Whether under federal statute or common law, the description of the relationship by the parties is not determinative. The substance of the relationship controls. Id.; Wardle v. Central States, Etc., supra. The distinction between the common law and federal law appears to be a broader definition of "employee" under the federal law. U. S. v. Silk, supra. This expansive reading of the term "employee" applies under ERISA. Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra.

Congress enacted ERISA to prevent abuse by employers of retirement and benefit plans established for the people who work for them. ERISA protects employees with long years of employment from losing anticipated retirement benefits due to lack of vesting provisions. 29 U.S.C. Sec. 1001(a) and (c). The focus is not whether the workers meet the common law definition, but whether they have provided years of service for which they have been promised retirement benefits. Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra. Any deviation from the common law definition must be in favor of a more expansive definition of the term "employee." Id.

The important characteristic of an employer-employee relationship is the retention by the employer of the right to

direct and control the manner of work performance. Richardson v. Cent. States, Southeast & Southwest, 645 F.2d 660 (8th Cir. 1981); Cf. Sec 31.34.01(c)-1(b) Internal Revenue Service Tax Regulations; Raymond E. Kirshaw, 14 TC 168 (1950). In Richardson the court held that the plaintiff was an employee under ERISA. Richardson, a truck driver, owned his own tractor unit, which was licensed to King Van Lines and bore the company color. He pulled only company-owned or -authorized trailers. The company controlled assignments, booked shipments, elected payments, and maintained total authority over Richardson's work under an "exclusive contract" arrangement. Richardson reported his income for social security and tax purposes as derived from self-employment. He was paid on a percentage basis as

opposed to separate amounts for wages and equipment rental. Richardson paid for all of his own fuel, insurance, and portions of the license fees. In Short v. Cent. States S.E. & S.W. Areas Pen. Fund, 729 F.2d 567 (8th Cir. 1984), the court weighed similar factors in finding a truck driver an employee within the meaning of ERISA.

The master-servant relationship has been defined in opinions interpreting other statutes or regulations. In NLRB v. United Insurance Co., 390 U.S. 254 (1968), the Supreme Court held that a debit insurance agent was an employee under the National Labor Relations Act. The Court assessed the employment relationship along common law principles:

> The agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but

> are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the 'Agent's Commission Plan' that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

Id. at 259.

Under Section 7701(8)(20) of the Internal Revenue Code, a full-time life insurance salesman is an employee with respect to provisions of the Internal Revenue Code. In Opinion Letter No. 81-43A, the U. S. Department of Labor has stated its opinion that a full-time life

insurance salesman is an employee rather than an independent contractor for the purposes of ERISA. In an interpretation of Title VII, however, the court in Jenkins v. Travelers Ins. Co., 436 F.Supp. 950 (D. Ore. 1977), held that insurance agents who were paid solely on the basis of commission were independent contractors.

The courts have balanced factors similar to the common law factors in determining employee status of insurance agents under ERISA. In Soloway v. Insurance Company, CIV-77-0849D (W.D. Okla. 1978) (a copy of said unpublished decision is attached to Defendant's Memorandum as Exhibit B, Docket No. 9b), the court listed the following factors in determining whether an employment relationship existed:

> (1) the extent to which the services in question are an integral part of the employer's business;

> (2) the employee's investment in facilities and equipment;
> (3) the nature and degree of control retained or exercised by the employer;
> (4) the employee's opportunity for profit or loss;
> (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and
> (6) the permanency and duration of the relationship.

After considering these factors, the court in Soloway held that an insurance agent for New York Life Insurance Company was an independent contractor rather than an employee. The court found that the requirements of ERISA did not apply to Soloway in respect to Incentive Deferred Compensation Program under which Soloway would have received payments had he not been terminated as an agent. A number of facts in Soloway are similar to this case:

> (1) Soloway was expressly denominated an independent contractor in the written agency agreement with New York Life;

(2) Soloway was free to and did determine his own working hours and sales methods;
(3) Soloway was paid on a commission basis;
(4) Soloway did not receive vacation, holiday or sick pay;
(5) New York Life did not withhold income taxes on commissions paid to Soloway and reported his commissions on Form 1099 rather than Form W-2;
(6) Soloway was contractually limited to a specific geographical area;
(7) Soloway was prohibited from selling policies of other companies and could only sell the types of insurance specified in the agent agreement. Also, New York Life reimbursed Soloway for a portion of his expenses and made available to him a furnished office and parking space.

The Soloway court found that New York Life had little control over how Soloway sold the insurance. Soloway was completely free to determine the means by which the sales would be consummated. He used his own judgment and initiative to determine the working hours and development of prospective sales as well as sales techniques. After Soloway had completed

the initial training period, New York Life exercised little control over Soloway in the field. Soloway was free to determine where and when to solicit prospective sales. Soloway was not required to submit regular reports to New York Life or regularly attend meetings.

In Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra, U. S. District Court Judge James C. Fox, determined the employer-employee question in a case very similar to this one. Judge Fox entered summary judgment in favor of the insurance agent, finding that he was an employee of North Carolina Farm Bureau within the meaning of ERISA. The court found that the evidence indicated extensive control over and dominance of the Farm Bureau in its dealings with agents and agency managers. The court noted the

following factors as indicative of the agent's status as an independent contractor:

> (1) The existence of Farm Bureau's qualified pension plan covering employees other than agents;
> (2) Agents were advised that they were considered to be treated as independent contractors by Farm Bureau;
> (3) Agents were paid on a commission basis, with all commission payments made by Farm Bureau being reported to the Internal Revenue Service on Form 1099 as commissions earned;
> (4) Farm Bureau never issued W-2 Forms to such agents. FICA or FUTA taxes were not withheld or paid by the insurance company on behalf of said agents;
> (5) Agents were not required to work any set hours by Farm Bureau and were in control of and independently responsible for their own schedules, appointments, and vacation time;
> (6) The agents retained as their proprietary interest file cards of their customers and contacts made wile agents of the insurance company even after termination of their licensing agreement with Farm Bureau, and, in fact, after termination of their contracts, certain plaintiffs solicited their old defendant's customers and contacts in their new business;
> (7) Certain agents would maintain separate accounts in their own names to make cash deposits of money paid for

premiums, and would in turn write checks on these amounts to the defendant for premiums due;
(8) Many of the agents maintained an office in their home and deducted those expenses on their tax returns;
(9) The agents filed tax returns with the Internal Revenue Service indicating they were self-employed;
(10) The agents paid for their own postage, long-distance calls, supplies, travel and entertainment expenses;
(11) Farm Bureau did not provide at its expense any health or life insurance for the agents;
(12) A number of agents had in force IRA's or HR-10 plans during the same period in which they were licensed with Farm Bureau and during the same time when applicable law did not allow such individual plans to be maintained unless plaintiff had self-employment status.

After considering these factors and others, the court found that the totality of the circumstances indicated that Farm Bureau, because of its dominant position, exercised control over the agents' means of performance. Farm Bureau furnished each plaintiff a document entitled "Manual of Instruction or Memorandum of Understanding

between North Carolina Farm Bureau Federation and (Name of County) County Farm Bureau." Agents either substantially conformed to the "suggestions" contained in the memorandum or were terminated. The memorandum gave detailed "suggestions" to agents regarding the performance of their duties, which, in fact, amounted to Farm Bureau's control over the agents. This same type of dominance and control was present between Nationwide and Darden.

In Fraver, the court found the fact of control to arise from the economic disparity between Farm Bureau and the agents. The court found the dominance to be evidence by the following facts:

> (1) The plaintiffs had almost no personal investment in their business. Farm Bureau provided their offices, furniture, secretary, all their insurance forms, applications and their phone service. All of these remained Farm Bureau property. The court found that Farm Bureau controlled the tools

utilized by the plaintiff in the performance of their occupation. The plaintiffs used their own personal cars;

(2) The plaintiffs' knowledge of the insurance business was acquired solely through training provided by Farm Bureau and their performance of Farm Bureau's business. Farm Bureau held regular training meetings at which attendance by the agency force was required, and the defendant provided an assortment of training and rate manuals and general guidelines;

(3) During the training period Farm Bureau agents were paid salaries for the first few years of employment. They were then paid multiple commissions;

(4) Plaintiffs were only permitted to sell insurance for Farm Bureau, or Southern Farm Bureau Life Insurance Company and for North Carolina Blue Cross and Blue Shield under plans approved by county boards. The plaintiffs were expected to work full-time on such sales. They were required to account and report directly and promptly to Farm Bureau for all collection and policy applications. Farm Bureau had the power to reject the applications. The court concluded that the agents worked full-time for a single employer with no independent use of skills;

(5) Farm Bureau had the power by contract to unilaterally establish territories in which the agents could solicit clients. Farm Bureau could change those territories at any time.

Considering these factors, the court found the relationship between the insurance agents and Farm Bureau to be that of employer-employee.

The Court must analyze the various factors of the employment relationship in light of the foregoing authority to determine whether Darden was an independent contractor or employee. Darden first became employed by Nationwide in September 1960. In the first years of his employment he underwent training by Nationwide and was paid a salary on a weekly basis. After his initial training period, Darden signed an Agent's Agreement and Nationwide began paying him on a commission basis. Over the years, Nationwide would periodically unilaterally change the Agent's Contract and Darden would sign the new contract.

As an insurance agent for Nationwide, Darden sold automobile insurance, fire insurance, life insurance and some group health and life insurance. He serviced Nationwide policyholders by collecting premiums and forwarding them to Nationwide and assisted policyholders and Nationwide with the processing of claims. In addition to receiving commissions from Nationwide, Darden was paid bonuses based on renewal of policies and a favorable loss ratio.

Darden operated his business in the same location since 1960. He first rented, then later purchased his office. Darden employed various clerical employees at his own expense to work with him at his office. Darden paid the expenses of maintaining the office, except for some office supplies provided by Nationwide. On the front of

the building Darden maintained a sign containing the word "Nationwide."

Nationwide obtained the appropriate insurance license for Darden from the State of North Carolina. The license indicated Darden was an agent of Nationwide, but he bore the expense of obtaining the license. Under Paragraph 4 of the Agent's Agreement, Darden agreed that he would represent Nationwide exclusively in the sale and service of insurance policies and would not write policies of insurance for other companies without the written consent of Nationwide. Darden would use other insurance companies only when Nationwide could not provide the required insurance. Darden paid his own employment taxes and income taxes from commissions forwarded to him by nationwide. Darden was eligible to purchase major medical insurance,

disability insurance and life insurance through a plan maintained by Nationwide for its agents. The Agent's Security Compensation Plan was paid entirely by Nationwide.

The Agent's Agreement indicates that Darden was an independent contractor; however, Darden was subject to supervision by Nationwide with respect to his office procedures. Nationwide ultimately terminated its relationship with Darden because of his "bad business practices."

The defendant says that the detailed nature of supervision of Darden is a material factual issue in this action. The Court has reviewed the undisputed facts as to this issue and the inferences therefrom in a light most favorable to the defendant. The Court has considered the facts in dispute to be true according to the

defendant's interpretation. Even by doing this, the Court concludes that there are not material facts in dispute, nor do the reasonable inferences arising therefrom create a material factual dispute.

Darden's relationship to Nationwide is similar to the relationship between the debit insurance agent and United Insurance Company in NLRB v. United Insurance Co., supra, in which the court held that debit insurance agents were employees and not independent contractors. Darden's relationship to Nationwide is even more analogous to that of Fraver and Farm Bureau in Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra, in which Judge Fox found Fraver to be an employee within the meaning of ERISA. A major distinction in Fraver is that the Farm Bureau agents had very little personal

investment in their businesses. Darden owned his building and office equipment; however, this factor is balanced by another distinction in Fraver--that of the Farm Bureau agents retaining a proprietary interest in their customer files and contacts. Accordingly, this Court concludes on the basis of Fraver and the other authorities cited herein that Darden was an employee of Nationwide under ERISA.

B. Employee Pension Plan Under ERISA

The next question is whether Nationwide's Agent Security Compensation Plan was an employee pension plan within the meaning of ERISA if the plan provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. 29 U.S.C. Sec. 1002(2). Both the deferred

compensation plan and extended earnings plan meet this criteria.[2]

Accordingly, this Court concludes that Nationwide's Agent's Security Compensation Plan was an employee pension plan subject to ERISA. As much, the covenant not to compete is null and void under ERISA. Winer v. Edison Brothers Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979). Pursuant to ERISA, Darden had a non-forfeitable right to his benefits under the extended earnings plan, 29 U.S.C. Sec. 1053(a)(2)(A), and the deferred compensation plan, 29 U.S.C. Sec. 1053(a)(2)(C).[3] Accordingly, Darden is entitled to summary judgment for the benefits to which he is entitled under Nationwide's Agent's Security Compensation Plan.

C. Pre-Judgment and Interest and Attorney Fees

Under the election which Darden had on file with Nationwide, he was entitled to commence receiving his annuity under the extended earnings plan shortly after his services were terminated and under the deferred compensation plan when he attained the age of 50, which he has already attained. Without an award of prejudgment interest, Darden will not be made whole since he was entitled to commence receiving funds approximately four years ago. To allow Nationwide to retain the interest on funds wrongfully withheld would constitute an unjust enrichment. Short v. Central States, S.E. and S.W., Areas Pension Fund, supra.

Under ERISA, an award of attorney fees is discretionary. 29 U.S.C. Sec. 1132(g). Courts have considered the following

factors in determining whether to award attorney fees under ERISA:

> (1) The degree of the opposing party's culpability or bad faith;
> (2) The ability of the opposing part to satisfy an award of attorney fees;
> (3) Whether an award of attorney fees against the opposing parties would deter others from acting under similar circumstances;
> (4) Whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA, and;
> (5) The relative merits of the party's position. Hummell v. S. E. Rikoff and Co., 634 F.2d 446 (9th Cir. 1980).

Neither party has acted in bad faith in this case. Nationwide can afford an award of attorney fees. Such an award would deter Nationwide from refusing to pay claims by other agents similarly situated to Darden. Darden maintained this action individually; however, it may benefit other agents. Nationwide's position has merit. The resolution of the employee/independent contractor question is close. Similar

provisions of Nationwide's Agent's Security Compensation Plan have not been interpreted by other courts. In weighing these factors, this Court concludes that an award of attorney fees against Nationwide should be DENIED, because of the lack of bad faith by Nationwide and the merits of Nationwide's position.

D. Conclusion

In conclusion, this Court recommends that summary judgment be entered in favor of the plaintiff, requiring the defendants to pay the sums to the plaintiff as required by Nationwide's Agent's Security Compensation Plan, plus pre-judgment interest. Plaintiff's request for attorney fees should be DENIED.

THIS MEMORANDUM AND RECOMMENDATION ENTERED, this the 7th day of March, 1985.

CHARLES K. McCOTTER, JR.
United States Magistrate

1 The plaintiff in support of his motion for summary judgment has submitted an affidavit from his office manager, Patricia Harkey. The defendants object to this affidavit as being unfairly prejudicial under Federal Rule of Evidence 403, because Mr. Kiker, the district sales manager, died prior to the filing of this suit and cannot respond to certain matters stated in said document. Also, the defendants contend there is contradictory evidence of record to the statements of this affidavit. This latter objection is without merit. The former objection is overruled because the statements were made by Kiker, as an agent of Nationwide, concerning a matter within the scope of his agency or employment during the existence of the relationship. Fed.R.Ed. 801(d)(2)(D); United States v. Mandell, 591 F.2d 1347 (4th Cir. 1979).

2 Nor do either of these plans meet the exemption of Department of Labor Regulation, 29 CFR Sec. 2510.3-2(b), et seq, setting forth the circumstances under which a severance pay plan will not be considered an employee pension benefit plan. The Regulation states that a plan providing severance benefits on account of the termination of an employee's service will not be considered an employee pension benefit plan if (1) the benefits are not contingent, directly or indirectly, upon the employee's retiring; (2) the total amount of severance benefits does not

exceed the equivalent of twice the employee's annual compensation for the year immediately preceding termination; and (3) all such payments to an employee are completed within 24 months after the termination of the employee's services.

[3] Darden had a non-forfeitable right to the benefits under Nationwide's Agent's Security Compensation Plan. The deferred compensation benefits were not payable until after the agent's agrement was cancelled by termination or otherwise. The agent could elect various options. Darden elected to have his deferred compensation paid to him by a life annuity. Under the deferred compensation plan, Nationwide adopted the Rule of 45 minimum vesting schedule of ERISA. 29 U.S.C. Sec. 1053(a)(2)(C). Under the Rule of 45, if the years of service equal or exceed 10 years, and if the sum of the age of the employee and the service equals or exceeds 55, then the employee has a non-forfeitable percentage interest of 100% interest in the benefits. When nationwide terminated Darden, he had completed 20 years of service and was age 46. The sum of his age and service equalled 66. His service exceeded 10 years. Therefore, Darden had a non-forfeitable interest in 100% of the benefits of the deferred compensation plan.

The extended earnings benefits could not be paid under Section 11(b) of the agent's agreement until after the agreement was cancelled. Then the benefits would be paid over a three year period unless the agent elected otherwise. Darden elected to have the extended earnings benefits paid to him by a life annuity. Under the extended

earnings plan, benefits are fully vested after the agent has completed five years of service with Nationwide. This exceeds the minimum vesting requirement of ERISA which provides that no employee must have a non-forfeitable interest of 100% of his accrued benefits after 10 years of employment. 29 U.S.C. Sec. 1053(a)(2)(A). Since Darden had completed 20 years of service, he had a non-forfeitable right under ERISA to the benefits provided by the extended earnings plan.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN, Plaintiff	)	
v.	)	ORDER
NATIONWIDE MUTUAL INSURANCE COMPANY, et al., Defendants	)	

[Filed June 22, 1988]

Robert T. Darden filed this action under ERISA (29 U.S.C. Sec. 1001-1461) in an attempt to obtain what he alleges to be his statutorily protected retirement income. Issues have arisen regarding Darden's status as an "employee" under ERISA and whether Nationwide's plan constitutes a "pension plan" under ERISA.

In remanding this action, the Court of Appeals held that this court had applied the incorrect standard in determining

whether Darden was an "employee" under ERISA. The Court of Appeals set forth a standard for determining whether a person is an "employee" under ERISA. The Court of Appeals also identified salient points to be investigated in determining whether a plan is a "pension plan." The court concluded by stating that the relevant questions were not suitable for summary judgment disposition there were still several issues of disputed fact. Darden v. Nationwide Mutual Insurance, 796 F.2d 701 (4th Cir. 1986).

Cross motions for summary judgment have been filed by the parties. The court heard argument on the motions on April 11, 1988. On the basis of argument and briefing, the court makes the following findings and conclusions.

The court finds that the question of whether Darden is an "employee" under ERISA is still unsuitable for summary judgment disposition. Accordingly, the parties' motions for summary judgment on that ground are DENIED.

The plan at issue in this case is comprised of two parts: Deferred Compensation Incentive Credits and Extended Earnings. The Extended Earnings program compensates an agent by paying him a sum equal to his earnings from renewal fees over the prior twelve months. The payment is made to the agent upon retirement or termination for any reason other than criminal act or fraud. Defendant argues that this form of compensation does not constitute a "pension plan" under ERISA. 29 U.S.C. Sec. 1002(2)(A).

The plan here is similar to the plan addressed in Fraver v. North Carolina Farm Bureau, 801 F.2d 675 (4th Cir. 1986). In Fraver the court found that a final compensation arrangement between the company and agent was not subject to ERISA. The court wrote:

> The post-termination benefits are calculated on the basis of the agent's commissions for the prior year and, in that respect, are like a final commission, paid over an extended term. . . . The agent could terminate his contract at any age, and the payments were to be made regardless of the reason for the termination except when the agent was terminated for reasons of fraud or criminal act. The amount of the payment is tied to only one factor, the amount of business in the last year prior to termination. . . . [T]he terms in question simply established business created by the agent, and . . . these payments do not constitute retirement income.

801 F.2d at 678. The reasoning of the Fraver court is compelling under the present set of facts. See also Wolcott v. Nationwide Insurance, No. C-2-84-854, slip. op. at 11-12 (S.D. Ohio, 1987). Darden would be entitled to his Extended Earnings upon separation with Nationwide no matter what his age as long as he had been with the company for five years or more. The amount of Extended Earnings is computed based upon one factor only--the amount of renewal commissions generated over the previous twelve months. The court finds, therefore, that the Extended Earnings program is not a "pension plan" within the meaning of ERISA.

The court does find, however, that the DCIC and Extended Earnings plans may be severed. The court finds that the question of whether the DCIC plan is a "pension

plan" under ERISA is also inappropriate for summary judgment disposition and accordingly motions made on this ground are DENIED.

The case will be restored to the trial calendar. The trial will be limited to the questions of whether Darden is an "employee" and whether the DCIC plan is a "pension plan" under the factors set forth in the Court of Appeals opinion.

All motions for summary judgment are DENIED. The clerk is directed to replace this action on the trial calendar.

SO ORDERED this 20th day of June, 1988.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE